APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 78-1746
DC #C77-631S
June 19, 1980

SEATTLE UNIVERSITY, A WASHINGTON NONPROFIT CORPORATION, PLAINTIFF-APPELLEE,

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AN AGENCY OF THE UNITED STATES OF AMERICA, DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

OPINION

Before: CHOY and FERGUSON, *Circuit Judges*, and BARTELS,* *District Judge*

PER CURIAM:

Section 901(a) of the Education Amendments of 1972, codified at 20 U.S.C. § 1681(a),[1] prohibits dis-

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*The Honorable John R. Bartels, Senior United States District Judge for the Eastern District of New York, sitting by designation.

[1]Section 1681(a) provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits

crimination on the basis of sex under any education program or activity receiving federal financial assistance. The Department of Health, Education and Welfare ("HEW"), pursuant to 20 U.S.C. § 1682,[2] promulgated regulations designed to effectuate the directive of § 901(a). The regulations in dispute, 45 C.F.R. §§ 86.51-.61,[3] are addressed to the employment prac-

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of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

[2] Section 1682 provides in pertinent part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law . . . .

[3] 45 C.F.R. § 86.51 provides in pertinent part:

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or

tices of educational institutions. The district court found these regulations invalid and enjoined their enforcement and the cutoff of assistance for noncompliance. We affirm.

Plaintiff Seattle University, a private university, received federal financial assistance for several of its programs. In June, 1975, the university was notified by HEW that a complaint charging sex discrimination in the award of salaries had been filed against the university by several faculty members in the School of Nursing. HEW initiated an investigation pursuant to Title IX. The university complied with several requests for information by HEW, but eventually refused to comply, charging that HEW had no authority under Title IX to conduct the investigation. The university, facing a cutoff in federal funds, filed suit for declaratory judgment and for injunctive relief.

After a hearing on cross-motions for summary judgment, the district court ruled that the adoption and issuance by HEW of the regulations at issue were in excess of the authority granted HEW by Congress under Title IX. HEW appeals.

HEW argues that both the language of the statute and the legislative history support its claim that Title IX protects employees. At the very least, it argues, HEW must be able to issue regulations which prohibit

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be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

sex discrimination in employment to the extent that it constitutes discrimination against students.

Three courts of appeal have held, in cases nearly identical to this case, that Title IX does not protect employees *qua* employees. *See Islesboro School Committee* v. *Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, 100 S.Ct. 467 (1979); *Junior College District of St. Louis* v. *Califano*, 597 F.2d 119 (8th Cir.), *cert. denied*, 100 S.Ct. 467 (1979); *Romeo Community Schools* v. *HEW*, 600 F.2d 581 (6th Cir. 1979).[4] Each of these courts has noted that neither the plain language of Title IX nor the legislative history support HEW's contention that Congress intended that the statute reach employment discrimination. *See, e.g., Islesboro, supra*, 593 F.2d at 426-28.[5]

Similarly, these decisions fully respond to HEW's argument that employment discrimination is proscribed under Title IX when that discrimination infects the beneficiaries of the federally assisted program.[6] *See, e.g., Islesboro, supra*, 593 F.2d at 430:

> This "infection theory," as it is called, has been approved where it has been shown that eliminating discrimination against students is impossible in the absence of eliminating discrimination

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[4]These courts, when combined, have invalidated 45 C.F.R. §§ 86.57(c), 86.51(a), 86.51(b)(3), and 86.54.

[5]The Supreme Court recently held that there is an implied private right of action under Title IX, but did not discuss whether employees are protected under that statute. *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). *Cannon* involved an applicant for admission to medical school who alleged that she was denied admission because of her sex.

[6]This court has recognized ". . . HEW must have substantial latitude in scrutinizing policies and practices of the institution

> against faculty . . . . While the basic premise might be correct, that does not adequately underpin a grant of authority to HEW to promulgate broad-ranging regulations canvassing employment-related discrimination. A nexus between the discrimination against employees and its effect on students must first be shown.

Id. (Citations and footnote omitted).

Each argument raised by HEW on this appeal has been thoroughly addressed by the three courts of ap-

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that may have a discriminatory impact on the intended beneficiaries of assistance." *United States* v. *El Camino Community College District*, 600 F.2d 1258, 1260 (9th Cir.), *cert. denied*, 100 S.Ct. 661 (1979). In that case, HEW sued to compel a college to supply information about its workforce pursuant to regulations (45 C.F.R. § 80) promulgated under Title VI. On appeal, the college argued that the regulations were in excess of statutory authority because they authorize the agency to investigate activities which do not receive federal assistance. The court did not reach the issue because the college had not raised the argument in the district court, but the court noted the necessity for latitude in *investigatory* regulations. The regulation primarily at issue there (45 C.F.R. § 80.4(d)) requires every applicant for federal financial assistance to execute an assurance of compliance with HEW regulations, and imposes an open-file examination of the applicant's records and programs. The regulation is applicable to the entire institution unless the institution establishes that some of its practices in no way affect its practices in the program for which federal aid is sought or the beneficiaries of such programs. No such "nexus" is provided in the regulations at issue here. The regulations at issue here prohibit sex discrimination in employment without requiring that any discriminatory effect on students as a result of the discrimination against the employees first be shown, as is required by the "infection" cases relating to racial discrimination in the schools and relied on by HEW: *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *cert. denied sub nom. Caddo Parish School Board* v. *United States*, 389 U.S. 840 (1967); and *Board of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969).

peal cited above and by the district court. We agree with their decisions, and we find it unnecessary to add to their discussions. The decision of the district court is AFFIRMED.

APPENDIX B

United States District Court

WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C77-631S

SEATTLE UNIVERSITY, A WASHINGTON NONPROFIT CORPORATION, PLAINTIFF,

vs.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AN AGENCY OF THE UNITED STATES OF AMERICA, DEFENDANTS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for hearing before the Honorable Morell H. Sharp on cross motions for summary judgment, plaintiff appearing by and through its attorneys, Moriarty, Long, Mikkelborg & Broz, by Robert J. Walerius and Douglas M. Duncan; defendant appearing through its attorney, John Merkel, United States Attorney, by Susan Barnes, Assistant United States Attorney, and Ricardo Cruz, Assistant General Counsel, Office of Civil Rights, Region X, Department of Health, Education and Welfare, and the Court having reviewed the pleadings, motions and affidavits on file, the briefs and memoranda of both parties, having heard argument of counsel and having been fully ad-

vised in these premises; NOW, THEREFORE, the Court does enter these

FINDINGS OF FACT

1. Seattle University is a Washington nonprofit corporation, having its principal place of business in Seattle, King County, Washington. Seattle University is a private institution of higher education.

2. Seattle University maintains certain educational programs and activities which receive financial assistance from defendant.

3. The University also maintains educational programs and activities which do not receive any federal financial assistance and operates other educational programs and activities which do receive such assistance, but from federal agencies other than defendant.

4. Defendant, Department of Health, Education and Welfare ("HEW"), is a federal department within the meaning of the Education Amendments of 1972, Title IX, § 902 (20 U.S.C. § 1682), and pursuant thereto has issued final regulations entitled "Nondiscrimination on the Basis of Sex in Educational Programs and Activities Receiving or Benefitting from Federal Financial Assistance," 45 C.F.R. Part 86.

5. By Subpart E of these regulations, 45 C.F.R. 86.51–.61, HEW purports to regulate employment practices in *all* educational programs and activities operated by recipients of federal financial assistance. See, 45 C.F.R. § 86.51.

6. Section 86.54 of Subpart E prohibits a recipient of federal financial assistance from making or enforcing

any policy or practice which discriminates between employees in rates of pay or other compensation on the basis of sex.

7. On or about June 27, 1975, Seattle University was notified in writing by HEW that a complaint alleging sex discrimination in the award of salaries under Title IX of the Education Amendments of 1972 had been filed against the University by certain faculty members in its School of Nursing. No students have joined in the complaint.

8. Pursuant to said complaint, defendant has undertaken a lengthy and exhaustive investigation of Seattle University's employment practices as they relate to salaries of faculty in the School of Nursing and all other faculty members at Seattle University.

9. Dr. William A. Guppy is the Academic Vice President of Seattle University, and has personally spent approximately 200 hours in accumulating requested data.

10. HEW's investigation is ongoing and continuing, but Seattle University has not complied with HEW's most recent demand for information and records, on the basis that HEW does not have legal authority to conduct the investigation despite the existence of the HEW regulations passed pursuant to Title IX. This investigation was preliminarily enjoined by this Court pending the outcome of this hearing.

11. Unless a permanent injunction is entered, HEW will find the University in noncompliance and will commence enforcement proceedings. If enforcement proceedings are commenced by HEW, the University

will suffer irreparable injury, loss and damage, including but not limited to loss of federal funds, loss of public confidence and reputation, reduction in private donations, and loss of students.

12. Seattle University has posted with this Court a surety bond in the amount of $1,000.00.

13. There is no genuine issue as to any material fact.

From the foregoing Findings of Fact, the Court now makes and enters the following

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this controversy.

2. Regulations issued by HEW entitled "Nondiscrimination on the Basis of Sex in Educational Programs and Activities Receiving or Benefitting from Federal Financial Assistance," 45 C.F.R. Part 86, are final regulations and are, accordingly, subject to judicial review.

3. There is an actual controversy between the parties which is ripe for judicial resolution.

4. The University is not foreclosed from bringing this action by virtue of the fact that it has not yet been actually found in noncompliance with Title IX, § 901 *et seq.* (20 U.S.C. § 1681) nor that it has not actually had its federal funding terminated by HEW.

5. Forcing the University to exhaust the administrative compliance procedures would be inappropriate and of no value in resolving the question of HEW's un-

derlying authority to promulgate the regulations at issue here.

6. Though cast in broad terms, the prohibitory language of 20 U.S.C. § 1681 (§ 901 of Title IX), nevertheless addresses itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs. Section 1681 must, therefore, be read to protect from sex discrimination only those persons for whom the federally assisted education programs are established. If the federally funded education program is established for the purpose of educating students, then it is the students who are protected by § 1681. Section 1681 does not protect the teachers, secretaries, administrators, or other personnel who are employed to staff the program.

7. If an education program is designed to aid a faculty member, e.g. a federal research grant, § 1681 protects from sex discrimination those faculty members who apply for and/or receive the research grant. However, the protection afforded the person is not in his/her capacity as an *employee*, but in his/her capacity as a direct beneficiary of a federally assisted education program.

8. This construction of § 1681 is borne out by the series of coverage exclusions provided in § 1681, all of which relate to student activity or enrollment. Not one of the exclusions involves a federally assisted education institution's employment practices. The explanation for this is: (1) either Congress meant to allow wide-open coverage of employment practices under § 1681 while closely regulating § 1681 coverage in all other respects, or (2) and what appears more likely,

Congress never meant to include employment practices within the coverages of § 1681 in the first place.

9. Section 1681 encompasses discrimination in only those specific education "programs and activities" that receive federal financial assistance. This conclusion is borne out by the plain language of § 1681. This language clearly directs that in determining the scope of the statutory prohibition, the threshold question is whether a specific education program or activity operated by an institution receives federal funding. HEW's interpretation (contained in its Title IX regulations) of § 1681's prohibitory scope turns the threshold question and, thus, the statute, around. Under HEW's Title IX employment regulations, the threshold question is whether an educational institution is merely a recipient of federal funds. If the institution receives any federal funds—even to a single program—then HEW can, in its view, regulate *all employment* practices in all educational programs operated by the institution. This interpretation is erroneous.

10. The words "program or activity" mean that which is authorized by and funded under federal education grant statutes. The words do not refer to the entire operation of the recipient institution, but only to the federally funded programs operated by such institution. *Romeo Community Schools* v. *HEW* (E.D. Mich., April 7, 1977), Slip Op. p. 24, n. 18; *Board of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068, 1077 (5th Cir., 1969). The prohibitory scope of § 1681 is, thus, "program specific" i.e., HEW has authority to regulate sex discrimination only in those specific programs which receive federal funding from

HEW. It does not have authority to regulate discrimination in every University program or activity.

11. An analysis of 20 U.S.C. § 1682 (§ 902 of Title IX) buttresses the conclusions that (1) employees of an educational institution are not protected persons under § 1681, and (2) the prohibitory scope of § 1681 is "program specific". First, § 1682 grants Federal agencies, like HEW, only one method of directly enforcing compliance with Title IX:

> ". . . termination of or refusal to grant or to continue assistance under such program or activity to any recipient [found to be in noncompliance] . . . ."

In the case of employment discrimination, this sanction is of limited enforcement value and has little or no justification. Since the funds provided by HEW to create programs and activities which are designed to educate students who participate in them, a cutoff of HEW funding would necessarily punish the students. Punishment of students in the affected programs is a particularly anomolous result since the sanction is not being imposed for the purpose of enforcing *their* rights. An ironic result of the imposition of this sanction is that with the program's funding cut off, the teachers and other employees who staff the program may be laid off. Since it is doubtful that Congress intended to resort to such an arbitrary enforcement measure to protect employee rights, it is similarly doubtful that Congress intended by § 1681 to protect employees at all. On the other hand, in a situation where students or other direct beneficiaries of federally funded programs are themselves the victims of

discrimination in that program, the cutoff of funds has obvious justification and enforcement value.

12. The fact that HEW may also enforce compliance with § 1681 ". . . by any other means authorized by law . . ." e.g., referring the case to the Department of Justice for some unspecified action, does not alter the conclusion that employees are not protected by § 1681. It is doubtful that Congress intended HEW to regulate employment discrimination, yet deny HEW the power to directly act to prevent such discrimination. As noted above, the sanction of aid termination is unreasonable and unjustified in cases of employment discrimination. This necessarily means that HEW's sanction or enforcement authority in Title IX employment discrimination cases would be to refer the case to the Department of Justice. This is a rather weak sanction to prevent employment discrimination and is, in turn, evidence that Congress never intended HEW to regulate employment practices under § 1681.

13. Secondly, § 1682 provides that HEW's authority to terminate federal funds for noncompliance with § 1681 must be ". . . limited in its effect to the particular program, or part thereof, in which such noncompliance has been found . . ." Thus, the only direct sanction provided by § 1682 for use by Federal agencies is a "program specific" one. HEW is prohibited from terminating the financial assistance to some programs in an educational institution's curriculum simply because another program is not in compliance with § 1681.

14. Since both §§ 1681 and 1682 are "program specific", HEW's regulation of *general employment* prac-

tices is inappropriate and unauthorized. This is because such regulation is inherently non-"program specific". In the case of faculty employees, an education institution's employment policies are general in nature, covering *all* faculty employees involved in *all* of an institution's education programs, whether the programs be federally funded or not. HEW's employment regulations prohibit sex discrimination against an employee ". . . under *any* education program or activity operated by a recipient . . ." and provide that an educational institution ". . . shall make all employment decisions in *any* education program or activity operated [by it] . . . ." 45 C.F.R. § 86.51 (emphasis added). These regulations are patently overbroad and exceed the scope of the authority granted to HEW under Title IX.

15. The legislative history of Title IX, treated in great detail by the parties, supports these conclusions.

16. HEW's argument that its interpretation of Title IX as covering employment discrimination is entitled to "great deference by the court" is unpersuasive. While it is ordinarily true that the administrative construction will be affirmed if it has a reasonable basis in law, the Supreme Court has stated, "the courts are the final authorities on issues of statutory construction, . . . and 'are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate, or that frustrate the congressional policy underlying a statute.' (Citations omitted)." *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973).

17. The court is similarly unpersuaded by HEW's "infection theory" argument. This theory has apparently only been recognized in Title VI (Civil Rights Act of 1964) and Fourteenth Amendment cases involving a very limited fact situation: dual school systems which claim to have effected desegregation notwithstanding the fact that complete racial segregation of faculty was maintained. Under the "freedom of choice" desegregation plans involved in those cases, the presence of a completely segregated faculty in a school conveyed a clear and unmistakable message to students as to which school they were expected to "choose".

18. Whatever validity the infection theory may have rests upon an effort to protect *students* from discrimination. This effort was quite clearly the focus of the cases which have recognized the theory. However, an effort to protect students is neither the focus of the HEW Title IX employment regulations, nor of its investigation in the instant case. These regulations and this investigation are clearly directed to one goal and one goal only: the protection of *employees per se*, not students who might possibly be "infected" by employee discrimination. There is no provision in the HEW regulations which specifies that the particular employment practice regulated must result in sex discrimination against students in federally financed education programs, nor does it appear that HEW considers itself under any obligation to establish such resultant student discrimination before the requirements of Subpart E may be enforced. Indeed, in the instant

case, HEW instituted the investigation pursuant to an employee complaint, not the complaint of a *student*.

19. HEW's adoption and issuance of Subpart E of its Title IX regulations, 45 C.F.R. §§ 86.51-.61, are in excess of the authority conferred by Congress upon HEW in Title IX, § 901 *et seq.* (20 U.S.C. § 1681 *et seq.*).

20. Seattle University should be granted a declaratory judgment that Subpart E of HEW's Title IX regulations and all actions and proceedings taken by HEW pursuant thereto with respect to Seattle University are invalid and void and of no effect whatsoever.

21. Seattle University should be granted a declaratory judgment that HEW may not terminate or refuse to grant or refuse to continue federal financial assistance to Seattle University under Title IX, § 901 *et seq.*, unless HEW finds, in accordance with Title IX, § 901 *et seq.*, that the University's federally funded programs are in noncompliance with Title IX, § 901 *et seq.*, and valid regulations enacted pursuant thereto.

22. The preliminary injunction previously issued in this action should be incorporated into a permanent injunction against HEW, its secretary, its other agents and employees and those persons in active concert or participation with them.

23. The bond posted by the University should be exonerated.

The Clerk of this Court is instructed to send uncertified copies of these Findings of Fact and Conclusions of Law to all counsel of record.

DATED at Seattle, Washington, this 3rd day of January, 1978.

/s/ MORRELL E. SHARP
UNITED STATES DISTRICT JUDGE

☆U.S. GOVERNMENT PRINTING OFFICE: 1980 328655 79

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1022-24—September Term, 1979

(Argued April 24, 1980 Decided July 24, 1980)

Docket Nos. 79-6136, -6247, -7747

NORTH HAVEN BOARD OF EDUCATION,

Plaintiff-Appellee,

v.

SHIRLEY M. HUFSTEDLER, *et al.*,

Defendants-Appellants.

TRUMBULL BOARD OF EDUCATION

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF EDUCATION and LINDA POTZ,

Defendants-Appellants.

B e f o r e :

KAUFMAN and OAKES, *Circuit Judges*,
and TENNEY, *District Judge*.*

Appeal from orders of summary judgment in the United States District Court for the District of Connecticut, Ellen Bree Burns, *Judge*, declaring regulations governing sex discrimination in employment issued by the Department of Health, Education and Welfare (now adopted by the Department of Education) invalid and enjoining the Department from withholding or threatening to withhold any federal funds under those regulations.

The Court of Appeals held that the employment discrimination regulations contained in 45 C.F.R. Part 86, Subpart E (now in 34 C.F.R. Part 106, Subpart E (May 9, 1980)) were authorized under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and hence were valid and enforceable.

Judgments reversed and cases remanded.

MARIE E. KLIMESZ, United States Department of Justice, Washington, D.C. (Drew S. Days III, Assistant Attorney General, Washington, D.C., Richard Blumenthal, United States Attorney for the District of Connecticut, and Brian

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* Of the Southern District of New York, sitting by designation.

K. Landsberg, United States Department of Justice, Washington, D.C., of counsel), *for Appellants Shirley M. Hufstedler et al. and United States Department of Education.*

BEVERLY J. HODGSON, Bridgeport, Conn. (Koskoff, Koskoff & Bieder, Bridgeport, Conn., of counsel), *for Appellant Linda Potz.*

SUSAN K. KREEL, Hartford, Conn. (Siegal, O'Connor & Kainen, Hartford, Conn., of counsel), *for Appellee North Haven Board of Education.*

PAUL E. KNAG, Bridgeport, Conn. (Cummings & Lockwood, Richard W. Rutherford, Bridgeport, Conn., of counsel), *for Appellee Trumbull Board of Education.*

OAKES, *Circuit Judge:*

Cognizant that four other courts of appeals and a number of district courts have held otherwise, we nevertheless are convinced after extreme care and consideration that regulations issued by the United States Department of Health, Education and Welfare (HEW)[1] concerning sex discrimination in educational

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1 At the time these suits were brought and appealed, the regulations in questions were printed at 45 C.F.R. Part 86, Subpart E, under the auspices of HEW. Since the jurisdiction over educational matters was transferred to the new Department of Education on May 4, 1980, these regulations have been reissued in identical form by that department at 34 C.F.R. Part 106, Subpart E, 45 Fed. Reg. 30802

employment are valid under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, as properly construed. Accordingly, we reverse the decisions of the United States District Court for the District of Connecticut, Ellen Bree Burns, Judge, which declared those regulations invalid and which enjoined HEW from withholding educational funding from two Connecticut school districts, North Haven and Trumbull, respectively.

FACTS

Two separate cases are here involved and they will be treated separately for factual purposes even though they both involve the same essential legal question.

I. *North Haven*—North Haven receives federal financial aid for its educational programs and activities, and hence is governed by the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, barring discrimination on the basis of sex. Since the 1975-76 school year, North Haven has used between 46.8% and 66.9% of its federal financial assistance to pay salaries of its employees and is expected to continue doing so.

On January 10, 1978, in response to a private complaint alleging that the North Haven Board of Education was violating Title IX by refusing to rehire a tenured teacher who had taken a one-year maternity leave, HEW requested North Haven to provide specific information concerning its policies on hiring, leaves of

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(May 9, 1980). To be consistent with the briefs of the parties and the district court decision, however, we will continue to refer throughout this opinion to the regulations promulgated by HEW and to HEW's authority under Title IX.

absence, seniority, and tenure. North Haven did not do so, asserting that HEW lacked authority to regulate employment practices under Title IX. When HEW notified the school district that the matter had been referred to its appropriate office for possible administrative enforcement proceedings, North Haven brought this action seeking declaratory and injunctive relief. The complaint alleged that the promulgation by HEW of the regulations contained in 45 C.F.R. Part 86, Subpart E, "was in excess of the statutory authority conferred by Congress in Section 902" of Title IX, 20 U.S.C. § 1682. After HEW moved in the alternative for dismissal or summary judgment and North Haven filed a cross-motion for summary judgment, the district court granted North Haven's motion for summary judgment on April 26, 1979.

II *Trumbull*—Appellant Linda Potz, a former guidance counselor in the Trumbull public schools, filed an administrative complaint with HEW alleging that the Trumbull Board of Education had discriminated against her on the basis of sex by giving her inferior job assignments, by providing her with inferior working conditions, and by not renewing her contract. The Trumbull board acknowledged receiving "substantial" federal financial assistance, although it is unclear how much, if any, of that assistance was used for guidance counseling. HEW determined that Trumbull had indeed violated Title IX by requiring Potz to perform typing and to run errands not required of male counselors, by moving her office to a smaller, poorly heated, and less comfortable space in the gymnasium away from the other counselors, by asking her to change a report showing that she had seen many more students in a given week than the number seen by her male

counterparts, and by not renewing her contract on the basis of her sex. On September 20, 1978, HEW notified the board that the school district was in violation of Title IX and ordered Trumbull to take corrective action including the reinstatement of Potz. Trumbull did not take such corrective action and instead filed this action for declaratory and injunctive relief against both HEW and Potz challenging HEW's authority to issue Subpart E, as in the North Haven case. The district court granted Trumbull's motion for summary judgment on May 24, 1979, based on its prior decision in North Haven, and on September 13, 1979, denied Potz's timely-filed motion to set aside the prior order of summary judgment and denied her motion for summary judgment.

THE DECISION BELOW

In each case, the district court declared Subpart E invalid and enjoined the federal defendants from interfering with federal financial assistance to plaintiffs for any alleged noncompliance with Subpart E. In holding that the prohibitions of Title IX do not apply to employment practices of educational institutions, the district court reached the same conclusion reached by a number of other courts.[2]

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2 *Seattle University v. HEW*, No. 78-1746 (9th Cir. June 19, 1980) (per curiam) (affirming 16b FEP Cases 719 (W.D. Wash. 1978)); *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, 100 S. Ct. 467 (1979) (affirming 438 F. Supp. 1021 (E.D. Mich. 1977)); *Junior College District of St. Louis v. Califano*, 597 F.2d 119 (8th Cir.), *cert. denied*, 100 S. Ct. 467 (1979) (affirming 455 F. Supp. 1212 (E.D. Mo. 1978)); *Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, 100 S. Ct. 467 (1979) (affirming *Brunswick School Board v. Califano*, 449 F. Supp. 866 (D. Me. 1978)); *Grove City College v. Harris*, No. 78-1293 (W.D. Pa. March 10, 1980); *Auburn School District v. HEW*, No. 78-154

Section 901(a) of Title IX, 20 U.S.C. § 1681(a), provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

In first granting summary judgment to North Haven, the district court relied principally on the reasoning of another district court in *Romeo Community Schools v. HEW*, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 100 S. Ct. 467 (1979). The district court held that § 901(a) "does not cover the employment practices of educational institutions," but rather only prohibits "sex discrimination against students and other direct beneficiaries of federal educational assistance funds." Aware that Title IX was patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, but without a provision similar to § 604 of Title VI excluding employment from the coverage of the statute,[3] the district court

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(D.N.H. March 29, 1979), *appeal dismissed*, No. 79-1261 (1st Cir. 1980); *Board of Education of Bowling Green City District v. HEW*, No. C78-177, 19 FEP Cases 457 (N.D. Ohio March 14, 1979); *University of Toledo v. HEW*, 464 F. Supp. 693 (N.D. Ohio 1979); *Dougherty County School System v. Califano*, No. 78-30-ALB, 19 FEP Cases 688 (M.D. Ga. August 22, 1978), *appeal docketed*, No. 78-3384 (5th Cir. Nov. 1, 1978).

3 Section 604 of Title VI, 42 U.S.C § 2000d-3 provides:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

concluded that such a provision was omitted from Title IX because it would have been inconsistent with other portions of the Title IX legislative package pertaining to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and to the Equal Pay Act, 29 U.S.C. § 206(d), rather than because Congress intended that employment be covered under § 901. The court also noted that § 901(a) on its face "addressed itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs," and that the express exclusions from coverage of § 901(a)[4] "relate solely to student activity or enrollment."

The court further relied on the fact that "[t]ermination of federal funds is the only sanction authorized" under Title IX and wondered whether Congress would have authorized termination of funds for a school program, thereby penalizing the students, where more effective and less costly alternative methods of prohibiting employment discrimination were readily available. *See* Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 Geo. L.J. 49, 61-62 (1976). Moreover, under § 902 of the Act, 20 U.S.C. § 1682, the district court noted that any termination of funds is "limited in its effect to the particular program, or part thereof, in which . . . noncompliance has been . . . found,"[5] and that

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4 Section 901(a) contains nine express exclusions from coverage under the basic prohibition, none of which specifically mentions employment.

5 Section 902 of Title IX, 20 U.S.C. § 1682, provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract

regulation of employment practices is inherently "non-program specific." In ruling against appellants, the court also noted that because Subpart E prohibits discriminatory employment practices "for their own sake" these regulations cannot be upheld on the so-called "infection theory" utilized in other cases—*i.e.*, that employment discrimination has an adverse effect upon the students themselves.[6]

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of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

6 *See Caulfield v. Board of Education of the City of New York*, 583 F.2d 605, 610-11 (2d Cir. 1978); *United States v. Jefferson County Board of Education*, 372 F.2d 836, 882-86 (5th Cir. 1966), *adopted en banc per curiam*, 380 F.2d 385 (5th Cir.) *cert. denied*, 389 U.S. 840 (1967).

Later, in a separate opinion ruling in favor of Trumbull, the district court concluded that the Supreme Court's decision in *Cannon v. University of Chicago,* 441 U.S. 677 (1979) (Title IX permits private right of action), did not affect its ruling, and adopted the reasoning of the court of appeals in *Romeo Community Schools v. HEW,* 600 F.2d 581 (6th Cir.), *cert. denied,* 100 S. Ct. 467 (1979), rejecting HEW's interpretation of the legislative history of Title IX. In the district court's view, the legislative history suggested "that Title IX's focus was upon students and other direct beneficiaries."

DISCUSSION

As in any other problem of statutory interpretation we must examine the words of the statute, the legislative history, and the statutory purpose to be served. We may also be aided by examining analogous statutes or statutes *in pari materia* as well as by applicable canons of construction, one of which in the immediate context is to give due weight to the contemporaneous construction of a statute by the agency charged with its administration. *See NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 274-275 (1974); *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34 (1971). In determining what weight is due, however, as Judge Learned Hand once put it:

> it is doubtful whether in the end one can say more than that there comes a point at which the courts must form their own conclusions. Before doing so they will, of course,—like the administrative tribunals themselves—look for light from every quarter, and after all crannies have been searched,

> will yield to the administrative interpretation in all doubtful cases; but they can never abdicate.

Niagara Falls Power Co. v. FPC, 137 F.2d 787, 792 (2d Cir.), *cert. denied*, 320 U.S. 792 (1943).

HEW argues that the language of § 901(a) clearly encompasses employment discrimination. The argument is that the general category of "person[s]" protected by § 901(a), 20 U.S.C. § 1681(a), is not limited to any particular class of persons and is subject only to the nine express exclusions set out thereafter. Obviously the persons include students and, HEW argues, equally clearly include employees of a university, college or school district who are in a position to "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" federally funded education programs or activities. However, this language is more ambiguous than HEW suggests. The First Circuit, for example, thought in *Islesboro School Committee v. Califano*, 593 F.2d 424, 426 (1st Cir.), *cert. denied*, 100 S. Ct. 467 (1979), that this language, "on its face, is aimed at the beneficiaries of the federal monies, *i.e.*, either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government." Indeed, it was due to the ambiguity of the virtually identical language in § 601 of Title VI, 42 U.S.C. § 2000d, and the confusion generated by it, that Congress found it necessary later to enact § 604 of Title VI, 42 U.S.C. § 2000d-3, barring application of Title VI to employment. *See* Kuhn, *supra*, 65 Geo. L.J. at 53-54. We hence must look beyond the language of the statute itself to determine its meaning.

HEW argues that its interpretation of § 901(a) is supported by the fact that none of the nine specific exemptions from the coverage of the statute contained in § 901(a)(1)-(9), 20 U.S.C. § 1681(a)(1)-(9), removes employment from the basic prohibition. We note that Paragraphs (a)(3) and (4) exclude religious and military institutions from the application of the statute and that the remaining exclusions exempt certain practices of otherwise covered institutions. It is true as HEW contends that none of these exemptions addresses the question of employment discrimination or in any way suggests that employment practices are excluded from the basic prohibition of the statute. But, as the Sixth Circuit has said, this argument "cuts both ways." *Romeo Community Schools, supra,* 600 F.2d at 584. While we cannot agree with HEW that the failure of the exclusions to mention employment is clear support for its position, we also cannot agree with the Sixth Circuit that because the exceptions relate to students "[i]t may be fairly assumed" that only students are the subject of § 901. *Id.* Indeed, Paragraphs (a)(3) and (4) do not mention students at all, but rather exempt entire categories of institutions. The Sixth Circuit's "assumption" is precisely that, and whether it is "fair" or not depends on the legislative history and purpose of Title IX.

HEW is on somewhat firmer footing when it argues that although Title IX is modeled after Title VI of the Civil Rights Act of 1964, *see Cannon v. University of Chicago, supra,* 441 U.S. at 694-96, Title IX conspicuously omits Title VI's exclusion of employment practices contained in 42 U.S.C. § 2000d-3,[7] even

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[7] *See* note 3 *supra*.

though the House proposed to include an equivalent provision in Title IX.[8] But the First and Sixth Circuits, as well as the court below, have taken the position that the House proposal was not ultimately included in Title IX because it would have been inconsistent with the sections of Title IX pertaining to employment discrimination under Title VII of the 1964 Civil Rights Act and the Equal Pay Act. *Islesboro School Committee, supra,* 593 F.2d at 428; *Romeo Community Schools, supra,* 600 F.2d at 584. *See also* Kuhn, *supra,* 65 Geo. L. J. at 57 ("The inclusion of section 904 in the bill was nothing more than a drafting mistake.") Again, we are pointed to a careful examination of the legislative history and purpose of the statute to determine whether HEW's conclusion or that of these other courts is the correct one.

In our view the legislative history, closely examined, supports HEW rather than the various court decisions which we have mentioned above. The Supreme Court has informed us of the overall objectives Congress sought in enacting Title IX:

> First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.

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8 *See* H.R. Rep. No. 554, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2566. The Conference Committee Report contains the following:

> (f) In addition, the House amendment, but not the Senate amendment, provided that nothing in the title authorizes action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. The House recedes.

Id. at 2671-72.

Cannon, supra, 441 U.S. at 704. We turn then to the actions of each House and of the conference committee to make the determination whether interpreting Title IX to cover employment discrimination is consistent with these congressional objectives.

When we look at the Senate we note that on August 5, 1971, Senator Bayh introduced an amendment to a pending higher education bill, S. 659, for the purpose of prohibiting sex discrimination by certain educational institutions. In introducing his amendment he stated:

> While over 50 percent of our population is female, there is no effective protection for them as they seek admission *and employment* in educational facilities. The antidiscrimination provisions of the Civil Rights Act of 1964 do not deal with sex discrimination by our institutions of higher learning.
>
> * * * * *
>
> Today, women seeking *employment* in higher education face an array of obstacles almost as insuperable as those which used to face blacks.

117 Cong. Rec. 30155-56 (1971) (emphasis added). The next day, Senator McGovern stated his support for Senator Bayh's amendment, and in doing so referred to statistics that only nine percent of America's college professors were women, only six percent of law school students were women, and only eight percent of medical school students were women. 117 Cong. Rec. 30411 (1971). Senator Bayh's 1971 amendment did not come to a vote, since it was ruled "nongermane." *See* 118 Cong. Rec. 5808 (1972). Senator Bayh's remarks quoted above indicate at least an initial intention on his

part to prohibit employment discrimination under the provision of his 1971 amendment which subsequently formed the basis of § 901.

Senator Bayh introduced a new version of his amendment on February 28, 1972, as Amendment No. 874 to S. 659, which was still under consideration by Congress. 118 Cong. Rec. 5802-03 (1972). In addition to the provisions of the 1971 proposal, Senator Bayh included provisions amending Title VII of the Civil Rights Act of 1964 and amending § 13(a) of the Fair Labor Standards Act, 29 U.S.C. § 213(a), to exempt from the scope of that subsection the Equal Pay Act, 29 U.S.C. § 206(d).[9] The amendment was passed by the Senate the same day it was introduced. 118 Cong. Rec. 5815 (1972).

In introducing his amendment, Senator Bayh stated that "sex discrimination reaches into all facets of education—admissions, scholarship programs, *faculty hiring and promotion, professional staffing,* and pay scales." 118 Cong. Rec. 5803 (1972) (emphasis added). The Senator went on to say:

> Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs *and employment resulting from those programs* . . . . More specifically, *the heart of this amendment* is a provision banning sex discrimination in educational pro-

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9 That portion of Senator Bayh's amendment dealing with Title VII, contained in § 1005 of the amendment, was not ultimately enacted as part of Title IX because a similar provision had already been enacted as §§ 2 and 3 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e(a) and 2000e-1. The portion of the amendment dealing with the Equal Pay Act, contained in § 1009 of the amendment, was enacted as § 906(b)(1) of Title IX and is now part of 29 U.S.C. § 213(a).

> grams receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and *faculty employment, with limited exceptions*. Enforcement powers include fund termination provisions—and appropriate safeguards—parallel to those found in title VI of the 1964 Civil Rights Act. *Other important provisions* in the amendment would extend the equal employment opportunities provisions of title VII of the 1964 Civil Rights Act to educational institutions, and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women.

Id. (emphasis added). Other courts have interpreted these remarks concerning the coverage of employment to refer not to the part of Senator Bayh's amendment that later became § 901(a) of Title IX, 20 U.S.C. § 1681(a), but rather to the amendment's provisions removing the exemption in Title VII for educational institutions and extending the protection of the Equal Pay Act to executive, administrative and professional positions. But Senator Bayh in his quoted remarks quite clearly referred to "faculty employment" in conjunction with the basic prohibition of his amendment and *then* referred to the "[o]ther important provisions" dealing with Title VII and the Equal Pay Act.

After making these introductory remarks, Senator Bayh in a prepared summary of his amendment divided the amendment into four parts and discussed each separately. 118 Cong. Rec. 5806-08 (1972). The first part of his summary is labeled "A. Prohibition of Sex Discrimination in Federally Funded Education Programs." Under this heading, Senator Bayh describes the

basic prohibition against sex discrimination and the enforcement provisions, noting that these sections "generally parallel the provisions of title VI." *Id.* at 5807. He also discusses the exclusions from coverage in this category. It is in the second part of his discussion, labeled "B. Prohibition of Education Related Employment Discrimination," that Senator Bayh describes the amendments to Title VII and the Fair Labor Standards Act. While these headings at first blush tend to support the other courts' view, Senator Bayh's description of the *first* portion of his amendment shows that the basic prohibition of § 901 was meant to apply to employment discrimination:

> This portion of the amendment covers discrimination in all areas where abuse has been mentioned—*employment practices for faculty and administrators*, scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth.

Id. (emphasis added).[10] This language strongly indicates that the first portion of the Act, containing § 901 and

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10 Senator Bayh made the following observations in introducing his revised amendment:

> I believe it is important to survey in some detail the scope of the problem in certain fundamental areas—hiring, scholarships, and admissions.
>
> A. Discrimination in Hiring and Promotion of Faculty and Administrators
>
> Discrimination against females on faculties and in administration is well documented and widespread abuse is clear. I have been dismayed to learn of the double standard the academic community has applied to those women who choose to make education their life work. In spite of high academic standards, a woman who has met the rigorous standards for a Ph.D. program may suddenly find that these same schools do not have sufficient confidence in their own standards to hire the graduate to teach. A recent report on Columbia University practices found that

its enforcement provisions, relates not only to discrimination against students and other beneficiaries,

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although the percentage of doctorates award to women rose from 13 to 24 percent between 1957 and 1968, the percent of women in tenured positions at the graduate facilities have remained constant—at slightly over 2 percent. Similar situations exist, according to testimony during the 1970 hearings at numbers of other schools.

Although women comprised 6.9 percent of those enrolled in law school in 1969, a survey of 36 prominent law schools during 1968-70 showed that out of a total of 1,625 faculty members, only 35 or 2.1 percent were women, and 25 percent of those 36 were classified as librarians.

. . . .

Furthermore, the rule is that once hired, women do not receive advancement as often as men. While almost half of the male teachers are given the status of full professor, only 10 percent of the women make it that far. As a result, the highest faculty ranks are weighted with men; the lowest rank with women:

Present Rank	*Men*	*Women*
Professor	24.5%	9.4%
Associate professor	21.9%	15.7%
Assistant professor	28.2%	28.7%
Instructor and below	25.3%	46.2%

Finally, those women who are promoted often do not receive equal pay for equal work. In 1965-66, at the instructor's level, the median annual salary of women was $410 less than that of male instructors; at the assistant professor's level it was $576 less; at the associate professor's level, $742 less; and at the level of full professorship, it was $1,119 less. "Fact Sheet on the Earnings Gap," U.S. Department of Labor, Women's Bureau, 1970. According to testimony submitted during the "1970 Hearings, the women at the University of Pittsburgh calculated that the University was saving $2,500,000 by paying women less than they would have paid men with the same qualifications.

Preference for men over women to fill administrative posts is just as clear. For instance, Dr. Peter Muirhead, Associate Commissioner of Education, testified during the "1970 Hearings" that more than two-thirds of the teachers in elementary and secondary schools are women, but they constitute only 22 percent of the elementary school principals and only 4 percent of the high school principals. According to a recent study by the National Education Association, only two women can be found among 13,000 school superintendents.

(footnote continued on next page)

but also to "employment practices for faculty and administrators." The *second* portion applies "title VII's widely recognized standards of equality of employment opportunity to educational institutions" and ensures that "both men and women employees receive equal pay for equal work" at such institutions. *Id.*[11]

While we are well aware of Justice Jackson's warning against selecting casual statements from floor debates, *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring), we at least get further reinforcement of the principal sponsor's views as expressed above by looking at the

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> In higher education, female administrators are virtually nonexistent. Dr. Ann Scott, from the University of Buffalo, highlighted the "progressive evaporation of women as we climb the academic ladder" by pointing out that while women are only 5 percent of the full professors at that institution, they are even less—1 percent—of the top administration "1970 Hearings." [Sic.] Even at women's colleges there has been a decline in recent years in the number of high administrative posts held by women. And as Dr. Bernice Sandler pointed out in a recent speech, if it were not for female presidents at Catholic colleges, the number of women college presidents would be less than the number of whooping cranes.
>
> 118 Cong. Rec. 5804-05 (1972).

11 There is some discrepancy in Senatory [*sic*] Bayh's breakdown of his amendment. The first part of his summary begins: "Central to my amendment are sections 1001-1005 . . . ." 118 Cong. Rec. 5807 (1972). Section 1005, however, is the section of Amendment No. 874 which contains the amendments to Title VII. Thus, an argument could be made that Senator Bayh's references to employment discrimination in this first portion actually are references to § 1005 rather than to the basic prohibition. It is clear from his discussion in the first two parts of the summary, however, that the first part was not meant to cover the Title VII provision, but only the basic prohibition, the enforcement mechanism and the exclusions. The discussion of the proposed amendment to Title VII does not come until the *second* part of the summary. Accordingly, we conclude that the mention of § 1005 of the amendment in the first part of the summary was simply an oversight.

debate on the Senate floor just prior to Senate passage of Title IX. In that debate Senator Pell, the floor manager of the entire education bill, addressed several questions to Senator Bayh concerning the scope of § 1001(a) and (b) of the Bayh Amendment, the predecessors of § 901(a) and (c) of Title IX. The following colloquy leaves little doubt that Senator Bayh intended employment practices to be covered under what is now § 901:

> MR. PELL. . . . Sections 1001(a) and (b) include all educational institutions which receive Federal assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded from coverage their admissions practices. Does the same exclusion apply to nonpublic institutions at the elementary and secondary level?
>
> MR. BAYH. At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, *and discrimination in employment within an institution, as a member of a faculty or whatever.*
>
> *In the area of employment, we permit no exceptions.* In the area of services, once a student is accepted within an institution, we permit no exceptions. The Senator from Rhode Island asked

about admissions policies of private secondary and primary schools. They would be excepted.

* * * * *

MR. PELL. . . . [D]o I understand the Senator to say that the faculty of private schools would have to reflect a sexual balance?

MR. BAYH. This amendment sets no quotas. It only guarantees equality of opportunity. The Senator from Indiana cannot be sure about the sexual balance in any faculty, but as far as employment opportunities are concerned, the answer would be "Yes."

* * * * *

MR. PELL. Would this apply to a parochial school where they have nuns *as teachers?*

MR. BAYH. No. *There is an explicit exception for education institutions controlled by a religious organization.*

* * * * *

MR. PELL. Mr. President, I refer to a preparatory school such as Peekskill Military Institute which is at the high school level. Would that school be expected to have *women teachers?*

* * * * *

MR. BAYH. *All military schools are excluded.*

118 Cong. Rec. 5812-13 (1972) (emphasis added).

It is clear from these questions and answers not only that Senator Bayh intended employment to be covered by § 901, but also that the exemptions for religious and military institutions now contained in § 901(a)(3) and

(4) apply to *employment* as well as to admissions and services. Obviously Senator Bayh's responses to Senator Pell that the employment practices of religious and military schools were covered by the exclusions in § 901(a) would make no sense if employment practices were not included within the scope of § 901(a) to begin with. Despite Justice Jackson's warning, such statements by the sponsor of a piece of legislation are at the very least helpful and may indeed be authoritative. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 67-68 (1964); *Schwegmann Brothers, supra*, 341 U.S. at 394-95.

We also note that one month after the Higher Education Amendments of 1972 containing Title IX were signed into law by the President, Senator Bayh published in the Congressional Record a summary of the requirements of Title IX prepared by Dr. Bernice Sandler of the Association of American Colleges. That summary's description of the basic prohibition of § 901(a) included a footnote which noted the following differences between Title IX and Title VI:

> Apart from admission coverage . . ., the Higher Education Act differs from Title VI in that the sex discrimination prohibition is limited to federally assisted *education* programs and activities, whereas the race, color and national origin discrimination prohibitions are applicable to *all* federally assisted programs. Title VI also specifically excludes *employment* from coverage (except where the primary objective of the federal aid is to provide employment). There is no similar exemption for employment in the sex discrimination provisions relating to federally assisted education programs.

118 Cong. Rec. 24684 n.1 (1972) (emphasis in original). Thus, after the Act's passage, the primary sponsor of Title IX adopted a summary of that title which expressly noted the distinction between Titles VI and IX in terms of employment coverage.

Turning to the House of Representatives, the House version of the amendments to the Higher Education Act of 1965 was simultaneously being considered as H.R. 7248. A provision on sex discrimination in educational institutions, similar to that introduced by Senator Bayh, was included in the bill reported by the House Committee on Education and Labor. *See* H.R. Rep. No. 554, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2511-12, 2566-67. The principal difference was the inclusion of § 1004 in the House bill, paralleling the language of § 604 of Title VI, which we have discussed above. The House Committee report states:

> *Section 1004* provides that nothing in this title may be taken to authorize action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Id. at 2566 (emphasis in original). The Committee's bill was passed by the House on November 4, 1971 without any change in the provisions of § 1004 of the bill. 117 Cong. Rec. 39353-54 (1971). There was no specific discussion of § 1004 during the House debate. 117 Cong. Rec. 39248 *et seq.* (1971). As we have pointed out, this provision in the House bill went to the

conference committee, and the House receded. *See* note 8 *supra*.

It is not enough, we think, to say as the court below and the other circuits have suggested that the deletion of this provision in conference was simply to avoid inconsistency with the other provisions of the bill proposing to amend Title VII and the Fair Labor Standards Act, since Congress could easily have drafted an employment exclusion applicable solely to the first portion of the Act. For example, Congress could readily have said: "Nothing in § 901 shall apply to any employees of any educational institution subject to this title except where a primary objective of the Federal financial assistance is to provide employment." In light of the ease with which an appropriate employment exclusion could have been substituted, and in light of the Senate sponsor's view of his amendment as expressed in his summary and in the debates from which we have quoted above, we cannot agree that the omission was simply correction of a "drafting mistake." Rather, the deletion of the House provision supports HEW's broader interpretation of the Act. Appellees point us to no language anywhere in the legislative history that even suggests that the conference committee deleted the provision merely for reasons of consistency, and we have not been able to find any. In short, this was *not*, in our view, a matter of simply correcting legislative inadvertence.

It is not without significance that Congress itself undertook a statutorily mandated review of the Title IX regulations which are here challenged. That review procedure provided at the time that any regulation would become effective not less than 45 days after transmission "unless the Congress shall, by concurrent

resolution, find that the standard, rule, regulation or requirement is inconsistent with the Act from which it derives its authority, and disapprove such standard, rule, regulation or requirement." 20 U.S.C. § 1232(d)(1) (Supp. IV 1974). Senator Helms introduced such a concurrent resolution to disapprove all of the HEW regulations issued under Title IX including Subpart E. S. Con. Res. 46, 94th Cong., 1st Sess., 121 Cong. Rec. 17301 (1975). The resolution was referred to the Senate Committee on Labor and Public Welfare, which took no action on it. In the House, Representatives Quie and Erlenborn introduced an amendment to a concurrent resolution which amendment specifically sought to disapprove the employment sections of the regulations. Their amendment stated: "Subpart E . . . is inconsistent with the Act since by amendment to Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act of 1938, Congress has conferred such jurisdiction upon the United States Equal Employment Opportunity Commission and the Department of Labor." Unpublished Amendment to H.R. Con. Res. 330, Hearings Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. (1975) on file with that Committee. In testimony before the House Education and Labor Committee's Subcommittee on Postsecondary Education, Senator Bayh expressed support for the HEW regulations, stating that HEW's "[T]itle IX guidelines, as the Congress mandated, call for equality in admissions, financial aid, course offerings, career counseling, *and in the case of teachers and other educational personnel, employment, pay and promotions*." Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the

House Committee on Education and Labor, 94th Cong., 1st Sess. 173 (1975) (emphasis added). The concurrent resolution and amendment were never passed out of the Education and Labor Committee. Thus, no concurrent resolution was passed by either House, and HEW's regulations took effect.

Subsequent attempts to limit the scope of § 901 have also failed. Later in 1975, Senator Helms introduced a bill, S. 2146, proposing to amend § 901 along the lines that we have suggested could have been used by Congress in the first instance if Congress intended to exclude employment from coverage. His bill read in part: "Nothing in [§ 901 of Title IX] shall apply to any employees of any educational institution subject to this title." 121 Cong. Rec. 23845-47 (1975). His bill was not adopted. A year later, Senator McClure offered another amendment to limit the coverage of § 901 to the "curriculum or graduation requirements of the institutions" receiving federal aid. 122 Cong. Rec. 28136 (1976). Senator Bayh made the following remarks in opposition to the amendment:

> The impact of this amendment is enormous—it would exempt those areas of traditional discrimination against women that [were] the reason for the congressional enactment of Title IX. These areas would include scholarship aid, *employment and employment benefits* and extracurriculum activities such as athletics.

Id. at 28144 (emphasis added). Senator McClure's amendment was not adopted. *Id.* at 28147.

While Congress *later* amended the statute requiring congressional review of such regulations to provide that the failure to adopt a concurrent resolution disapprov-

ing a final regulation should not be construed as approval of the regulation or as a finding of consistency with the authorizing statute, 20 U.S.C. § 1232(d)(1), we think the failure of Congress here to adopt resolutions, *along with bills and amendments*, specifically designed to exempt employment from HEW regulation after hearing arguments on both sides provides some evidence that coverage was intended. *See Cannon v. University of Chicago, supra*, 441 U.S. at 703; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14-16 (1941). Moreover, Congress has twice amended the coverage of Title IX when it has disagreed with HEW's interpretation of the statute. 20 U.S.C. § 1681(a)(8), (9). *See NLRB v. Bell Aerospace Co., supra*, 416 U.S. at 275; *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313-14 (1933). We recognize that this review of subsequent congressional action with respect to the regulations is not conclusive, and we agree with the First Circuit that "Congressional inaction should not be lightly construed as approval," *Islesboro School Committee v. Califano, supra*, 593 F.2d at 428 n.3. Nonetheless, we think the congressional reaction to the Title IX regulations, in the context of the legislative history as a whole, lends some additional weight to the view that § 901 was expressly intended to relate to employment practices.

Nor is it particularly noteworthy that employment discrimination in educational institutions is now prohibited by Title VII and the Equal Pay Act. Overlapping jurisdiction in the area of employment discrimination is well recognized. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974). We visualize Congress as in effect saying

that individual employees may exercise their rights under either Title VII or the Equal Pay Act, but that HEW may use its powers to threaten to withdraw federal funds or actually withdraw them if necessary when a recipient of federal financial assistance practices discrimination on the basis of sex.[12]

We recognize the argument that purports to speak both to the heart and to "common sense."—*i.e.*, that Congress could hardly have intended to penalize the students who are primary beneficiaries of a federally funded program simply because there is discrimination against teachers or staff. While this argument may have some initial appeal, we believe it to be superficial. HEW unquestionably has the authority to withhold funds when it finds that any *student* or group of *students* has been discriminated against in any educational program even when the vast majority of students in such a program have suffered no discrimination and would be hurt by the loss of funds. It is perfectly consistent, in our view, to find that Congress has given HEW the same authority to oversee sex discrimination in educational *employment* in light of the grave congressional concern over sex discrimination in that area. *See* note 10 *supra*. As we have indicated, our reading of the statutory scheme leads us to conclude that Congress intended HEW to have available the potent remedy of fund withdrawal to ensure compliance with the prohibition against sex discrimina-

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12 We note that HEW included in Subpart E an exemption, similar to that contained in § 703(e) of Title VII, 42 U.S.C. § 2000e-2(e), for those situations where sex discrimination can be justified as a "bona fide occupational qualification" (BFOQ). 45 C.F.R. § 86.61 (now 34 C.F.R. § 106.61 (May 9, 1980)). This eliminated the possible inconsistency that HEW could withdraw funds under Title IX for sex discrimination that is expressly authorized under the BFOQ exception of Title VII.

tion in employment rather than rely solely on the important, but usually piecemeal, sanctions available to aggrieved employees under Title VII and the Equal Pay Act.

Finally, while § 902 of Title IX requires that an order terminating federal financial assistance be "limited in its effect to the particular program or part thereof, in which . . . noncompliance has been . . . found," we disagree with the court below and the district court in *Romeo Community Schools, supra*, 438 F. Supp. at 1033, that this limitation "is implicitly a limitation on HEW's authority to regulate as well." Such a construction is contrary to the judicial approval given to broad HEW guidelines under Title VI of the Civil Rights Act of 1964, which also contains this language limiting fund termination. *See United States v. Jefferson County Board of Education*, 372 F.2d 836, 847-61 (5th Cir. 1966), *adopted en banc per curiam*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967). Moreover, employment discrimination is no less "program specific" than other practices recognized as subject to the provisions of Title VI and Title IX. For instance, discrimination in admissions to an institution's graduate schools is clearly prohibited by Title IX regardless of whether the discrimination occurs solely in one graduate program or all graduate programs. By the same token, employment discrimination might occur in one program or in more than one program. Nothing in § 902 requires HEW only to issue regulations directed at specific programs. Rather, we think the statute merely requires that any termination of funds be limited to the particular program or programs in which noncompliance with § 901 is found and does not require HEW to specify prior to termination which particular programs receiving financial assistance are covered by its regulations.

In order to terminate federal assistance to a particular program under Title IX, HEW is required to show that there has been sex discrimination in that program. And if discrimination occurs throughout an entire educational system, that system can be considered one "program" under Title IX or Title VI for purposes of terminating funds. *See Jefferson County, supra*. But the question of the scope of HEW's authority to terminate funds is different from the question whether HEW is authorized by § 901 of Title IX to issue broad regulations prohibiting sex discrimination in employment. The latter question we answer in the affirmative, and hence do not reach the question whether HEW has authority to issue regulations which prohibit sex discrimination in employment to the extent that it constitutes discrimination against students—the so-called question of "infection." [13]

Because of its holding that HEW had no authority to issue employment regulations under Title IX, the district court did not take any evidence on the questions whether North Haven or Trumbull engaged in any discrimination on the basis of sex or whether, if so, any fund termination had to be limited to a particular program or particular programs. In reversing the summary judgments granted by the district court in favor of the school boards, we express no view as to whether the HEW regulations were actually violated or what remedies, if any, might be appropriate. We merely hold that HEW has authority under Title IX to promulgate the employment discrimination regulations at issue here.

We accordingly reverse the judgment below and remand the cause for further proceedings.

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13 *See* note 6 *supra* and accompanying text.

APPENDIX D

United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 78-1746
DC CV 77-631-S

SEATTLE UNIVERSITY, A WASHINGTON NONPROFIT CORPORATION, PLAINTIFF-APPELLEE,

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AN AGENCY OF THE UNITED STATES OF AMERICA, DEFENDANT/APPELLANT.

APPEAL from the United States District Court for the Western District of Washington (Seattle)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered June 19, 1980.